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September 15, 1992

Donna Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N. W.  
Washington, D. C. 20554

Dear Ms. Searcy:

Transmitted herewith, on behalf of Gabelli Funds, Inc. and Mario J. Gabelli, respondents in MM Docket Number 92-201, is their Opposition to the Petition of Garden State Broadcasting Limited Partnership seeking leave to intervene in that proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Herbert D. Miller, Jr.

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**

**ORIGINAL**

Washington, D. C. 20554

IN RE ORDER TO SHOW CAUSE  
DIRECTED AGAINST

**MARIO J. GABELLI**

AND

**GABELLI FUNDS, INC.**

MM Docket No.

92-201

**RECEIVED**

**SEP 15 1992**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TO: Honorable Joseph Stirmer  
Chief Administrative Law Judge

**OPPOSITION TO PETITION FOR  
LEAVE TO INTERVENE**

Gabelli Funds, Inc. and Mario J. Gabelli ("Investors") file herewith, by their attorneys, their Opposition to the Petition of Garden State Broadcasting Limited Partnership ("Garden State") seeking leave to intervene in this proceeding.

**I. The Commission has Already Held that Garden State Lacks Standing.**

The Garden State petition to intervene here is a secondary outgrowth of its 1987 application for a new commercial television station, which was mutually exclusive with a license renewal application filed by WWOR-TV, in Secaucus, New Jersey. As recited in the Commission's *Memorandum Opinion and Order* on the Pinelands, Inc. transfer application (FCC 92-376, released on August 21, 1992), a settlement agreement between Garden State and the licensee of WWOR-TV was disapproved because Garden State had filed its competing application for the improper purpose of reaching a settlement with the renewal applicant.

Accordingly, Garden State was held unqualified to become a Commission licensee, and its application was denied (FCC 92-376, para. 3). Garden State's appeal of that denial to the United States Court of Appeals for the District of Columbia Circuit is pending (Case No. 92-1065).

For the ostensible purpose of preserving its hearing rights in the Secaucus comparative renewal proceeding, Garden State petitioned to deny an application for Commission consent to the transfer of control of the licensee of WWOR-TV from Pinelands, Inc. to BHC Communications, Inc., asserting that its hearing rights in any remanded renewal proceeding with respect to the comparative qualifications of the WWOR-TV licensee<sup>1</sup> might be jeopardized by grant of the transfer application. The Commission properly dismissed its petition for lack of standing, finding that the injury claimed involved a different proceeding and was merely contingent and speculative (FCC 92-376, para. 18). Garden State's appeal of that dismissal is also pending (Case No. 92-1388).

Having been held by the Commission to lack standing to pursue its contingent and speculative interests in the WWOR-TV licensee's comparative qualifications in the Pinelands transfer proceeding, Garden State even more clearly lacks standing to pursue those interests here. In the transfer proceeding, Garden State at least had a contingent and speculative interest in whether the WWOR-TV license should be transferred and in the transferring licensee's comparative

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<sup>1</sup> Needless to say, the Commission's determination that Garden State is not qualified to be a licensee would have to be reversed first.

qualifications. It does not even have that level of interest here. Here, the only issue to be tried is whether Investors should be ordered to cease and desist from their alleged violations of the Commission's rules and of the Communications Act. Garden State has expressed no views on, much less demonstrated even a contingent and speculative interest in, that issue. It has none.

Garden State's only claim to an interest here is that by virtue of Investors' **former** interests in Pinelands, Inc., the information produced here may impact upon the comparative aspects of any revival of its WWOR-TV proceedings which may hereafter be ordered by the Court of Appeals<sup>2</sup>. Garden State's position that this contingent and highly speculative impact is sufficient for grant of party status here is directly contrary to the Commission's holding that it lacked standing to petition to deny the Pinelands transfer application.

**II. A "very Substantial Showing of Special Circumstances" is Required for Intervention in a Show Cause Proceeding.**

The Garden State petition to intervene in this show cause proceeding purports to have been filed pursuant to Section 1.223 of the Commission's Rules; however, that section mentions only hearings involving applications, and it has long been held that the standards for intervention in license revocation proceedings are much more stringent. While no cases have been found reciting the standards for intervention in show cause proceedings, the same section of the Communica-

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<sup>2</sup> Evidently, Garden State also wishes to use the fruits of its participation here in its presentations to the Court of Appeals, see Petition, pp. 2 - 3. Garden State does not say how it proposes to get the record here before the Court of Appeals there, and it is far from clear that it would be able to do so, in any event.

tion Act (47 U.S.C. §312) applies, and the same procedures under the Administrative Procedure Act are applicable to both (47 U.S.C. §312(e)).<sup>3</sup> It is, therefore, reasonable to assume that the standards for intervention in show cause proceedings are no less stringent than those in revocation proceedings.

In *Victor Muscat*, 22 RR 2d 1001 (1971), the Commission held

"Section 1.223(b) intervention is a matter of privilege, not right. Before bestowing that privilege, the Commission must first weigh, among other things, the effect on an expeditious disposition of the proceeding. 'The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of proliferation of parties and other participants.' The Firestone Tire and Rubber Co., FTC Docket N. 8818, page 4 (October 23, 1970). It would seem reasonable, particularly in a prosecutory-type proceeding where the agency has the burden of proof, to require a substantial showing of special circumstances in order to justify intervention by parties who are otherwise strangers to the proceeding. **Such showing would require that the intervenors raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the petitioner the status of a party.** What constitutes good cause for intervention will vary with the type of case, satisfaction of the above requirements, and other considerations. Herein, WATR has not shown that its participation will elicit any pertinent information not already before the Commission through official notice and the existing parties including the Broadcast Bureau, nor has it shown any other valid justification for intervention. Discretionary intervention will therefore not be authorized." (22 RR 2d at 1003). (Emphasis added). See also *Western Connecticut Broadcasting Co.*, 26 RR 2d 359 (1973); *Algreg Cellular Engineering*, 69 RR 2d 1346 (Rev. Bd. 1991).

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<sup>3</sup> Garden State appears to concede this (see Petition, p. 4).

Here, as in a revocation proceeding, the Bureau has the burdens of going forward and of proof, all of the other considerations relied on in *Victor Muscat* apply, and there is no evident basis for a more lenient standard.

**III. Garden State has Failed to Show Any Special Circumstances Even Arguably Justifying Intervention Here.**

Garden State has not even attempted to make the special showing recited in *Victor Muscat, supra* that it "raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the petitioner the status of a party." Indeed, Garden State mentions neither *Victor Muscat*<sup>4</sup>, nor the special showing it requires<sup>5</sup>. Nor is it possible to divine from Garden State's petition that it has **any** issue of law or fact to argue or raise, substantial or otherwise, which might even tangentially affect the outcome of this proceeding. It has none.

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<sup>4</sup> Garden State does cite *Quality Broadcasting Corp.*, 4 RR 2d 865 (1965), a revocation proceeding that predated *Victor Muscat, supra* by more than five years. There is no mention there of the special showing now required. Garden State also cites *West Jersey Broadcasting Co.*, 48 RR 2d 970 (1980), which was neither a revocation nor a show cause proceeding. Both cases involved individuals whose reputations and future livelihoods were seriously in jeopardy because of the proceedings. While Garden State says that the matters at issue here are more important to it than its reputation (Petition, pp. 3 - 4), that proposition is not self evident and is, in any event, immaterial, in view of the requirements set forth in *Victor Muscat, supra*.

<sup>5</sup> Nor does Garden State bother to mention that its Petition to deny the Pinelands transfer was dismissed for lack of standing.

**IV. The Matters which Garden State Says it Wants to Explore in This Proceeding Are Neither Material Nor Relevant Here.**

Contrary to the erroneous assumptions upon which Garden State's intervention petition is predicated, this show cause proceeding involves **only** the question of whether Investors should be ordered to cease and desist from their alleged present violations. Neither the character nor the comparative qualifications of Pinelands, Inc. *et al*, nor other matters about which Garden State expresses concern, are involved here.

As shown in Investor's September 4, 1992 Motion for Clarification of *Order to Show Cause*, this proceeding does not contemplate the imposition of forfeitures for any alleged past, present, or future violations<sup>6</sup> or other misconduct. Therefore, no evidence of past violations<sup>7</sup>, wilfulness, or such other matters as might in other circumstances be relevant to whether a forfeiture should be imposed on Investors, or its quantum, can be relevant here. *A fortiori*, information concerning the comparative qualifications of the former licensee of WWOR-TV is not relevant here, and the "information" about which Garden State now professes curiosity has nothing whatever to do with this proceeding.

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<sup>6</sup> In its September 11, 1992 Comments, the Bureau agreed that the *Order to Show Cause* does not invoke the forfeiture provisions of 47 U.S.C. §§503(b)(3) - (4) (Bureau Comments, p. 1).

<sup>7</sup> As the Commission observed in its *Memorandum Opinion and Order* in *Pinelands, Inc.*, *supra*, Investors' interest in Pinelands declined to 4.71 percent prior to August 21, 1992 (FCC 92-376, para. 4 n. 4); therefore, that interest was nonattributable under the rules (*Ibid*) even at the time of the *Pinelands* decision and at the time of the contemporaneous issuance of the present *Order to Show Cause*. Any violation involving Investors' Pinelands, Inc. holdings which may earlier have existed has already ceased, and is not among the alleged violations to be dealt with in the present show cause proceeding.

For example, Garden State contends that, if admitted as a party, it would "conduct a focused inquiry into . . . the prior failures of [Investors] to report various media interests" (Petition, p. 4). No reporting violations are charged in the *Order to Show Cause*, and Investors' prior discharge of whatever unspecified reporting obligations Garden State may have in mind simply is not relevant here. Garden State claims that it also wants to inquire into

"(1) all media interests held by Gabelli or entities in which he has an interest since the filing of the WWOR-TV, Inc. renewal application, (2) any inquiries or responses to inquiries addressed to Gabelli or related entities seeking information regarding the media interests of Gabelli or related entities, and (3) all reports or documents prepared by Gabelli or related entities listing, describing or otherwise relating to media interests held by Gabelli or related entities." (Petition, pp. 5 - 6).

However much Garden State may wish for its own purposes to inquire into these matters, dating back to the filing of the WWOR-TV license renewal application five years ago in 1987, for such impact as they might have on a remanded WWOR-TV comparative renewal hearing, they have nothing whatever to do with whether **Investors** are **presently** in violation of any Commission rules or, if so, whether they should be ordered to cease and desist. It seems obvious that, by ordering an expedited hearing so that any **present** violations may be resolved promptly, the Commission did not intend for this show cause proceeding to be turned into a vehicle for a wide ranging fishing expedition by Garden State into whether there may have been **past** ownership violations, the extent to which Investors may in the past have disseminated information to Commission licensees



or others concerning their investments or other matters, or the state of awareness of Pinelands (or others) of such matters.

**V. Garden State's Participation Here Would Not be Useful.**

Garden State also claims that it can, in some unspecified way, assist the Commission in resolving the issues here. However, Garden State does not claim to be privy to Investors' holdings or to have better access to information about those holdings than the Bureau. Indeed, its offer to help does not extend beyond its claim to familiarity "with the record generated in the transfer of control proceeding" ( Petition, p. 4). Garden State does not even suggest that it is more familiar with that record than the Bureau. And it is the entirely different record in this case that matters. There is simply no way that Garden State can be of assistance in developing a record here.

**VI. Garden State Does Not Need to Intervene to Use the Record Here Elsewhere.**

Should the Court of Appeals eventually overturn the Commission and direct that further WWOR-TV proceedings be held, Garden State's use of the public record generated here -- assuming it is of any pertinence in a new WWOR-TV case -- would be neither facilitated by grant, nor hindered by denial, of intervention here. The record will be equally available either way. What Garden State obviously seeks is to convert this proceeding into an entirely different proceeding, designed to develop information Garden State would like to

have for reasons different from those for which the Commission issued the show cause order. This expedited proceeding should not be burdened in that manner.

### Conclusion

The Commission has already held Garden State to lack standing in a proceeding much more pertinent to the WWOR-TV comparative renewal proceeding. There is even less reason to permit it to intervene here. To do so would substantially delay this "expedited" proceeding through Garden State's announced efforts to attempt to interject matters which have nothing to do with the only issue here under adjudication, as to which Garden State has no legally cognizable (or even contingent and speculative) interest and in which it has claimed none. Accordingly, Garden State's petition for leave to intervene, which falls far short of the standard articulated in *Victor Muscat*, supra, should be denied.

Respectfully submitted,

**Gabelli Funds, Inc. and  
Mario J. Gabelli**

By /s/ Alan Y. Naftalin  
Alan Y. Naftalin

By /s/ Herbert D. Miller, Jr.  
Herbert D. Miller, Jr.

By /s/ M. Anne Swanson  
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September 15, 1992

## Certificate of Service

I, Donna Rhudy, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by Hand Delivery:

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September 15, 1992